

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-4665-2011 (O&M)
Date of decision 1.2.2018

Vinod Kumar and another Petitioners
Versus
Radhey Sham and ors Respondents

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Mr. Sanjiv Gupta, Advocate for the petitioners.
Mr. Ashok Arora, Advocate for respondent No.1.

1. *Whether the Reporters of local newspaper may be allowed to see the judgment ?*
2. *To be referred to the Reporter or not.*
3. *Whether the judgment should be reported in the digest ?*

KULDIP SINGH J. (ORAL)

Impugned in the present regular second appeal is the judgment dated 7.5.2011, passed by learned Additional District Judge, Hisar, affirming the judgment and decree dated 22.5.2008 passed by learned Additional Civil Judge, (Senior Division), Hisar, vide which in a suit for possession by way of partition, it was held that plaintiff- Radhey Sham is entitled to 1/11th share in the suit property mentioned at Serial No. (i) and (ii) whereas rest of the shares are to be inherited by the remaining brothers-sisters of the plaintiff in equal shares.

Regarding the property mentioned in the site plan (Annexure P-3), findings are recorded that the boundaries of said property do not tally with the sale deed. Therefore, plaintiff can file a separate suit.

The facts of the case are that plaintiff-respondent No. 1 filed a suit for possession by way of partition in respect of three properties mentioned below as (now marked *property No. (i)* as ABCD, *property No. (ii)* as EFGH and *property No. (iii)* as IJKL): -

(i) One house and factory, bounded (marked as ABCD) as under: -

East: 102 feet house of Sarwan Bishnoi;
West: 102 feet property Brij Lal and Baldev son of Lekh Ram;
North: 20 feet thorough passage; and
South: 20 feet thorough street.

(hereinafter to be referred *property No. 1*)

(ii) One house and factory, bounded (marked as EFGH) as under: -

East: 40 feet property Ram Gopal;
West: 40 feet property of Mani Ram Bishnoi;
North: 20 feet street; and
South: 20 feet property of Mohan Lal.

(hereinafter to be referred *property No. 2*)

(iii) One house and factory, bounded (marked as IJKL) as under:

East: 65 feet property of Chhabil Dass;
West: 65 feet property of Uma Dutt Photographer;
North: 20 feet thorough street: and
South: 20 feet property of Mahan Lal deceased.

(hereinafter to be referred as *property No. 3*)

Plaintiff-respondent claims that he along with his five brothers has 1/6th share each in *properties No. 1 & 2* and *property No. 3* was purchased by him with defendants No. 1 to 3 and 5 in the year 1966- 1967 in which he has 1/5th share.

It is further submitted that *properties No. 1 and 2* which are marked as ABCD and EFGH are owned by Mohan Lal-father of the plaintiff, who died on 20.6.1994 and thereafter mother of plaintiff namely

Gulabi Devi also died on 3.3.2000. Then the plaintiff become the owner in possession of 1/6th share in the property.

Plaintiff-respondent sought partition of the said property. Defendants No. 1 & 5; defendant No. 2 and defendants No. 3 & 4 filed their separate written statements.

However, the suit was contested by defendants No. 3 and 4, in which they claimed that plaintiff-respondent has sought 1/11th share in the property left behind by their father-Mohan Lal (since deceased).

It is stated that in addition to the parties to the suit, parties have also got five sisters namely Smt. Chanderkalan; Smt. Kaushalya Devi; Smt. Santosh Devi; Smt. Satya Bhama and Smt. Snehlata. It was further pleaded that property was already divided in the year 1971 by way of family settlement and the parties were delivered separate possession of the properties which have been detailed in the written statement and reproduced in the lower Court judgment for the sake of brevity, need not to be repeated over here.

From the pleadings following issues were framed: -

- (i) Whether the plaintiff is entitled for the decree of possession by way of partition regarding property in dispute situated at Adampur, District Hisar, as detailed in the headnote of the plaint on the grounds as stated in the plaint? OPP.
- (ii) Whether the plaintiff has no cause of action to file the present suit? OPD.
- (iii) Relief.

Learned trial Court held that boundaries of the *property No. 3* marked as IJKL do not tally with the sale deed Ex. DW2/5. Therefore, plaintiff-respondent can file separate suit regarding the same. Regarding the other properties, it was held that plaintiff has got 1/11th share accordingly

preliminary decree as was passed declaring the plaintiff-respondent entitled to 1/11th share in the property as shown in the site plan Ex. P1 and Ex. P2 which are *properties No. 1 and 2*.

Learned counsel for the petitioners, who were defendants No. 3 and 5 before the trial Court, has vehemently argued that learned trial Court has committed immaterial irregularity or illegality by passing a preliminary decree regarding *properties No. 1 and 2*. Once, it has come to the notice of the Court and it is not denied by the plaintiff-respondent that parties have got five sisters, no preliminary decree for partition could be passed without making them parties. It is not disputed that the parties have in addition to six brothers, who are party to the suit, there are five sisters also and the trial Court has in fact held that they have also got shares in the disputed property. That is why the property of deceased- Mohan Lal was divided into eleven parts.

I am of the view that in the absence of necessary parties, i.e. non joining of five sisters in the suit, no preliminary decree for partition could be passed, declaring the rights of the plaintiff-respondent. The five sisters were necessary parties and they were required to be heard before passing such a preliminary decree. Moreover, the shares of each of the legal heirs were also to be separately declared and were to be separately partitioned at the time of passing of the final decree. Therefore, the suit qua *properties No. 1 and 2* (as per the site plan Annexure P-1 and P-2) will fail, on the simple ground, that all the necessary parties were not joined and no preliminary decree for partition could be passed in the absence of five of the legal heirs.

As such, the findings of both the Courts below in this regard

are reversed and suit of the plaintiff qua *properties No. 1 and 2* stands dismissed with liberty to the plaintiff-respondent to file a suit for partition afresh after joining of the necessary parties if he so desires.

Now coming to the *property No. 3*, the dimensions of property have been reproduced above. Now as per the sale deed, the dimensions of the property in the sale deeds DW 2/5 are as under: -

East:	shops Chabildass 66 feet
West:	Goverdhan Rai 66 feet
North:	thorough passage 17 feet 9 inches.
South:	shop of Mohan Lal son of Surat Dass 19 x 1/4 feet

If these dimensions are tallied with the descriptions given in the property, it would mean that there is error of one feet mentioned in the measurement of East and West and there is a small difference of measurement towards North and South. On the West, in the plaint property is shown of Uma Dutt, Photographer where as in the sale deeds it is shown to be the house of Goverdhan Rai.

I am of the view that the dimensions are more or less same. The small error in the measurement cannot be made a ground to throw out the entire suit, relegating the plaintiff to file a separate suit. The Court has always powers to mention the correct boundaries while passing the preliminary decree. Therefore, the judgment passed by both the Courts below declining the relief qua *properties No. 3* are hereby set aside and it held that plaintiff is entitled to preliminary decree regarding *property No. 3*, purchased vide sale deed DW-2/5, boundaries which are as under: -

East:	shop of Chabildass 66 feet
West:	property of Goverdhan Rai 66 feet now shown as property of Uma Nath photographer 66 feet
North:	thorough passage 17 feet 9 inches.
South:	shop of Mohan Lal son of Surat Dass 19 feet x 1/2 inches

situated in Adampur, Old Mandi, District Hisar.

It is further directed that defendants No. 1, 2, 3 and 5 namely Suresh Kumar, Sajjan Kumar, Inder Parsad now represented through his LR and Om Parkash through his LRs and Jagdish Prashad through his LRs are also entitled to 1/5th share in the said property and entitled to preliminary decree for the same. Preliminary decrees, accordingly, passed.

Te appeal is allowed in the above noted terms.

Decree sheet be drawn.

Parties are left to bear their own costs.

(KULDIP SINGH)
JUDGE

1.2.2018
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Whether speaking / reasoned	Yes
Whether Reportable:	No